No. 258

In the Supreme Court of the United States

OCTOBER TERM, 1948

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE PITTSBURGH STEAMSHIP COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. In its brief, pp. 18–25, the Company contends that since the commission of unfair labor practices was attributed to only fifteen of the Company's 600 supervisors, on seven out of seventy-three ships, the Board could not predicate a finding upon such evidence that the Company was engaged in a pre-determined campaign to interfere with, restrain and coerce its employees in violation of Section 8 of the Act. This contention clearly relates to the substantiality of the evidence supporting the Board's findings, and not to the issue decided by the court below, the alleged bias and prejudice of the trial examiner.

The Company argues that the Board, "With a year to prepare its case, and with willing and even partisan witnesses available to it from every ship, it was unable to present any evidence of a single incident or utterance unfriendly to the Union on the part of 590 of its 600 supervisors or on 66 of its seventy-three ships" (brief, p. 21). We do not know the source of the Company's information, for there is nothing in the record to indicate that witnesses "from every ship" were available, or that such witnesses if available would have been "willing and even partisan." It must be remembered that the hearings in this case took place between July and October 2, 1945, about a year and a half after the organizing campaign leading up to the 1944 election, when most of the unfair labor practice incidents occurred. During almost the entire period the country was actively engaged in a war, and seamen were in great demand and were constantly shifting from the lakes to the high seas (R. 241–242). It cannot, therefore, be assumed that the Board had available all witnesses who might have supported its case.

Indeed, as counsel for the Union stated at the hearing "The Union has made every effort to find every seaman involved in these ships in the year 1944, during the period covered by the complaint. Except for the ten or eleven witnesses we have managed to produce now, these were the only ones we could produce after a search over a period of a year. We have been

unable to find any additional ones. These men are shipping. They are shipping on both oceans. It is not an easy matter to bring these men to a hearing just when we want them brought. The Company has a fairly easy time bringing its masters and mates. But you can't bring unlicensed men who are sailing under the orders of the War Department. It is almost miraculous that we have brought as many as we have" (R. 242): Board counsel added, "I would like to say, further, that we have affidavits sworn to before agents of the Board of several others, whom we cannot secure for this hearing" (*Ibid.*). He also stated, "I have a good many affidavits of men who are scattered on the seven seas. It is impossible to produce them" (R. 241). The Company's repeated contention that no evidence was adduced as to the other ships because no unfair labor practices had been committed on them is therefore unwarranted under the circumstances. In view of the nature of the industry and the war time conditions prevailing during that period, no inference in either direction can properly be drawn.

In any event such additional evidence, even if available, would have been cumulative and therefore not decisive. The printed record herein contains more than 860 pages, and the hearing took almost ten days, including evening and night sessions, and was spread over a period of more than two months. As has been stated, "Where the

array of witnesses called to testify on a given side mounts up in numbers, it is obvious that each additional witness increases, in almost geometrical ratio, the possibilities of confusing the issues * * *" VI Wigmore, *Evidence* (1940 ed.), Sec. 1907. Additional evidence of unfair labor practices similar to those already proven would have extended the hearing unreasonably, and would have served no useful purpose. Cf. *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U. S. 219, 232.

Since the Board found on substantial evidence that the Company had engaged in violative practices on seven ships, its remedial order based upon such findings must be sustained. The question is not how many employees were coerced or discriminated against but whether the Company, through its supervisors, could interfere with, restrain, or coerce or discriminate against *any* of its employees in violation of Section 8 of the Act. If there is evidence to sustain the Board's findings that the Company did engage in violative practices with regard to the 250 crewmen on the seven ships about which testimony was adduced, the Company must be held responsible even though no evidence was produced relating to the remainder of the fleet.[1]

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[1] Although it is well settled that the effectiveness of an employer's coercive conduct need not be proven, *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 599; *National Labor Relations Board* v. *Illinois Tool Works*, 153

The courts have not heretofore questioned the validity of Board orders because unfair labor practices were shown to have occurred on a few ships of a fleet. Thus, in *Matter of South Atlantic Steamship Co.*, 12 N. L. R. B. 1367, unfair labor practices were proven to have occurred on only one of a fleet of six ships. Nevertheless the company was held liable by the Board, was directed to post compliance notices on all its docks and vessels (12 N. L. R. B., at p. 1383), and the order was enforced in full. *South Atlantic Steamship Co.* v. *National Labor Relations Board*, 116 F. 2d 480 (C. A. 5), certiorari denied, 313 U. S. 582. Only two ships out of twenty-eight were involved in the case of *Matter of The Texas Company*, 42 N. L. R. B. 593, but the Board there too found the company responsible, and ordered posting on all its ships and docks (42 N. L. R. B., at p. 609). In decreeing enforcement of the Board's order, *The Texas Company* v. *National Labor Relations Board*, 135 F. 2d 562, the Court of Appeals for the Ninth Circuit stated (at p. 563):

> This evidence is sufficient to warrant the Board's findings of interference, restraint and coercion. * * *. The Board was within its powers in concluding that these

F. 2d 811, 814 (C. A. 7), cf. *National Labor Relations Board* v. *Donelly Garment Co.*, 330 U. S. 219, 231, it is interesting to note that the Union lost the election held in June 1944 by only 169 votes, a lesser number than composed the crews of the seven ships on which violations were proven (R. 802; 274, 761).

> discharges were *pursuant to the anti-union attitude of petitioner* as shown from the testimony concerning Baldwin's [a mate] statements. * * *. Since two vessels and their officers are involved, it is no abuse of the Board's discretion in ordering the usual notices posted in several places accessible to petitioner's employees. [Italics supplied.]

Similarly in *Matter of Waterman Steamship Corporation,* 7 N. L. R. B. 237, unfair labor practices were proven to have taken place on only three ships of a fleet of twenty-six.[2] The Board nevertheless directed the company to post compliance notices on all its ships, and this Court directed enforcement of that order. *National Labor Relations Board* v. *Waterman S. S. Corp.,* 309 U. S. 206, 210, 221. And in *Matter of Isthmian Steamship Company,* 22 N. L. R. B. 689, where unfair labor practices were proven in connection with but one of twenty-seven ships, the Board's findings were held sufficiently supported and the order enforced. *National Labor Relations Board* v. *Isthmian Steamship Co.,* 126 F. 2d 598, 601 (C. A. 2). In none of the cases cited above did the courts consider the possibility that

[2] Although the number of ships owned by the Waterman Company does not appear in the Board's decision, it is set forth in another decision in a representation case reported six months later and covering approximately the same period involved in the unfair labor practice case. *Matter of Waterman Steamship Corporation,* 10 N. L. R. B. 1079, 1080.

unless violations were proven on more than a few ships—and in each case the number involved is comparable percentage-wise to those in the instant case—the company could not be held liable for those unfair labor practices which were found to have taken place. See also, *National Labor Relations Board* v. *Phillips Gas & Oil Co.*, 141 F. 2d 304, 306 (C. A. 3); *National Labor Relations Board* v. *Hollywood-Maxwell Co.*, 126 F. 2d 815, 819 (C. A. 9).[3]

Even if the Company had offered testimony as to the complete absence of any violative conduct by the officers of sixty-six vessels, such evidence if admissible, would not affect the Board's determination that as to the seven ships here involved unfair labor practices were proven. This would be sufficient to justify a fleet-wide remedial order. Similar conclusions have been reached in connection with violations of other statutes. Thus in *Bowles* v. *Montgomery Ward & Co.*, 143 F. 2d 38, the Court of Appeals for the Seventh Circuit affirmed an injunction restraining further violations of the Price Control Act, although evidence was adduced that violations of a few regulations had been found in only twenty-five out of 640

[3] It is interesting to note that in the *Hollywood-Maxwell* case, the Board found that the employer had committed unfair labor practices in one plant, and limited the application of its order to that plant. The Court, *sua sponte*, modified the Board's order to make it applicable to all plants operated by the Company (126 F. 2d, at p. 819).

stores owned by the company. The injunction itself was nation-wide in scope,* and prohibited violations of any regulations under the act. And in *United States* v. *General Motors Corp.*, 121 F. 2d 376, certiorari denied, 314 U. S. 618, the same court affirmed the conviction of the corporation of violation of the anti-trust laws based upon the testimony of forty-seven dealers who testified they were coerced, although the corporation offered to produce the remainder of its 15,000 dealers in the United States to prove the contrary (121 F. 2d, at pp. 397–398). Thus, if the employees on the other sixty-six ships had been called to testify, and had given testimony that there were no coercive acts committed, the Board would nevertheless have been justified in rejecting such evidence as immaterial and in holding the Company responsible for the unfair labor practices committed on the seven ships concerning which positive evidence of violative conduct was adduced. Cf. *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U. S. 219, 223–230.

Since negative testimony could not affect the validity of the Board's findings, obviously the failure to adduce such testimony should have no greater probative value. And if the Board's findings of restraint and coercion may stand in

* Although the opinion of the court does not mention the territorial scope of the order, the record reveals that it was applicable to all operations of the company throughout the country.

the face of such testimony (330 U. S., at p. 231), then they must be sustained where no other evidence is adduced. *A fortiori* the failure of the Board to produce additional evidence to show that unfair labor practices were committed on the other sixty-six ships cannot raise an inference that the Company was not engaging in a course of conduct designed to interfere with, restrain and coerce its employees in violation of Section 8 of the Act.

2. The Company argues that "Although it might legally be liable to any one injured by the unauthorized acts of the supervisory employees" (brief, p. 9) it cannot be held responsible for the coercive statements and discriminatory acts of its licensed officers in the instant case. However, this Court rejected a similar contention in *Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 519, where the employer was held responsible although it was unaware of the anti-union conduct of its supervisors when it occurred, and issued instructions to them to be neutral as soon as it learned of their activities. This Court there stated (at p. 521):

> The question is not one of legal liability of the employer in damages or for penalties on principles of agency or *respondeat superior*, but only whether the Act condemns such activities as unfair labor practices so far as the employer may gain from them any advantage in the bargain-

> ing process of a kind which the Act proscribes. To that extent we hold that the employer is within the reach of the Board's order to prevent any repetition of such activities and to remove the consequences of them upon the employees' right of self-organization, quite as much as if he had directed them.

The Company contends, however, that its instructions to the officers were issued prior to their commission of any of the unfair labor practices (brief, pp. 19–20, 25). We submit that the doctrine enunciated in the *Heinz* case is equally applicable in such a situation, particularly where, as here, the Company did not clearly and definitely advise its employees concerning the alleged orders of neutrality[5] (R. 830; 667–668). Courts of Appeals have applied the principle set forth in the *Heinz* case and held employers liable for the conduct of their supervisors in similar cases. Thus in *National Labor Relations Board* v. *Bird*

[5] The Company contends that the "Ferbert" letters evidenced such notice to the seamen (brief, pp. 20–21). However, the Board found these letters themselves to "constitute an integral and inseparable part of the respondent's otherwise illegal course of conduct" (R. 855). Obviously, therefore, they cannot be considered as true statements of neutrality. In any event the letters do not specifically advise the employees that the Company had given strict orders to its supervisors to abstain from engaging in anti-union activity. Compare, *Boeing Airplane Co.* v. *National Labor Relations Board*, 140 F. 2d 423, 425–428 (C. A. 10), where the Company publicized to its employees its repeated instructions to its supervisors concerning their neutrality.

Machine Co., 161 F. 2d 589, a case in many respects similar to the instant case, the Court of Appeals for the First Circuit said (at p. 591):

> Where, however, as here, disparaging remarks by supervisory employees are joined with threats of economic reprisal and loss of privileges, they may be used to indicate a course of conduct coercive in nature. See *N. L. R. B.* v. *American Laundry Machinery Co.*, 2 Cir., 1945, 152 F. 2d 400. Certainly the foremen threats concerning loss of privileges, including rest periods, vacations and bonuses are a violation of § 8 (1) of the Act. See *H. J. Heinz Co.* v. *N. L. R. B.*, 1941, 311 U. S. 514, 61 S. Ct. 320, 85 L. Ed. 309. But the respondent contends that it is not chargeable with responsibility for these foremen activities since respondent's president at the commencement of the Union campaign had called a meeting of supervisory personnel and explicitly instructed them not to interfere with the union activity of the employees. The purport of these instructions was not conveyed generally to the employees although there was testimony that some few knew of the position that the president had taken. But the Heinz case has held that where the employer may gain advantage from such unauthorized foremen anti-union activities it is within the Board's province to prevent repetition thereof by its order.